

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION**

B.P., et al.,

Plaintiffs,

v.

No: 2:23-cv-00071-TRM-JEM

CITY OF JOHNSON CITY, TENNESSEE, et al.,

Defendants.

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PLAINTIFFS' MOTION FOR LEAVE TO FILE A SUR-REPLY

COME NOW Plaintiffs B.P., H.A., and S.H., individually and as proposed class representatives of all others similarly situated, ("Plaintiffs"), through their undersigned counsel, to respectfully move this Court for permission for leave to file a sur-reply to Defendant Peters' reply in support of his supplemental motion for attorneys' fees. This Motion is supported by the contemporaneously filed declarations of Vanessa Baehr-Jones and Elizabeth Kramer.

INTRODUCTION

Leave to file a sur-reply is appropriate because Defendant Peters' reply attaches, and relies upon, a document produced by B.P. that was not referenced in his motion or in Plaintiffs' opposition. Plaintiffs' sur-reply seeks only to explain the provenance of that document.

ARGUMENT

District Courts may allow a party to file a sur-reply at their discretion. *Rose v. Liberty Life Assurance Company of Boston*, No. 3:15-cv-28, 2015 WL 10002923, at *1 (W.D. Ky. Oct. 19, 2015). "Although the Federal Rules of Civil Procedure do not expressly permit the filing of surreplies, such filings may be allowed in the appropriate circumstances, especially "[w]hen new

submissions and/or arguments are included in a reply brief, and a nonmovant's ability to respond to the new evidence has been vitiated." *Key v. Shelby County*, 551 Fed. Appx. 262, 265 (6th Cir. 2014) (quoting *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 481 (6th Cir. 2003)).

Peters' reply attaches a series of text messages that were produced after B.P.'s deposition. While Plaintiffs regret this timing, the delay was despite good faith efforts and did not result in prejudice to Defendant Peters. On May 21, 2024, Plaintiffs learned from their ESI vendor that additional, potentially relevant data was identified on B.P.'s device, due to a search criteria error in the data pull. Baehr-Jones Decl. ¶ 4; Kramer Decl. ¶ 3. Plaintiffs' counsel had three straight days of depositions in this matter, and as soon thereafter as feasible, reviewed that data and produced responsive, non-privileged documents, including the attachment to Peters' reply. Kramer Decl. ¶ 4. Plaintiffs' counsel Ms. Baehr-Jones coordinated with B.P. at the outset of the litigation (and on additional occasions as the case progressed) to search for and collect documents. Baehr-Jones Decl. ¶ 5. Those efforts should have, but did not, identify the text message at issue. *Id.* This was a mistake, but nothing more. Based on assurances from their ESI vendor, Plaintiffs believe that all responsive, non-privileged documents from B.P. have been produced. *Id.* As always, and as was done in this circumstance, if counsel become aware of documents that should be produced, they will do so promptly.

Importantly, the timing of Plaintiffs' production of text messages did not prejudice Peters. The Court already denied Peters' request during the May 21, 2024 hearing to keep B.P.'s deposition open pending additional document production. If Peters believes the later-produced documents warrant re-opening the deposition, he may make that motion, and Plaintiffs will respond in due course.

CONCLUSION

If leave is granted, Plaintiffs will seek to file their sur-reply, attached as **Exhibit 1** to the Declaration of Vanessa Baehr-Jones, which presents only the information set forth above.

Dated this June 17, 2024.

Respectfully submitted,

/s/ Elizabeth A. Kramer

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CERTIFICATE OF SERVICE

I HEREBY certify that a copy of the foregoing has been filed and served via the court's electronic filing system on June 17, 2024, to counsel of record:

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/s/ Elizabeth Kramer
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